No. 13403

United States
Court of Appeals
For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Brief of Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division

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I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

The action arises on a criminal information brought by the United States of America charging in thirteen counts the transportation in interstate commerce on a public highway of property without there being in force with respect to the defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The Statutory provisions declaring

such action to be an offense against the laws of the United States are contained in the Interstate Commerce Act, Part II, (49 U.S.C.A. §306(a) and 49 U.S.C.A. §322). The jurisdiction of the District Court arises by virtue of the foregoing statutes and 18 U.S.C.A. §3231. The jurisdiction of the Circuit Court of Appeals arises by virtue of the provisions of 28 U.S.C.A. §1291. One of the issues raised on appeal in this action is the propriety of the action of the District Court in proceeding to final determination of the action in view of the so-called "primary jurisdiction" doctrine first announced by the United States Supreme Court in *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907).

II.

STATEMENT OF THE CASE

a. General factual information giving rise to the issue.

Appellant has for some years held a certificate of public convenience and necessity authorizing the transportation of property in interstate commerce as a motor carrier issued to it by the Interstate Commerce Commission. (Exhibit 1.) Included in this authority is an authority to transport "commodities generally, . . . except dangerous explosives . . . " between, among other places, Oakland and San Francisco, California, and points in Oregon and Washington. (Ex. 1, Tr. 29-31.)[1]

[1]References are to page of the Transcript of Record on Appeal, and to the Exhibits which are a part of the Record on Appeal by stipulation.

Shortly prior to September, 1950, appellant submitted to the United States Government through the Office of the Chief of Transportation at Washington, D. C., quotations for the transportation of freight for the government over the lines of the appellant. (Tr., 182-184.) With these quotations were submitted copies of the certificate of public convenience and necessity held by appellant. (Tr. 182-184.) Shortly following this action, and prior to September, 1950, the U. S. Government Sierra Ordnance Depot at Herlong, California, began routing traffic over appellant's lines. (Tr. 182-183.) Herlong, California, is approximately 40 miles northwest of Reno, Nevada, and is not a point served by appellant. (Tr. 47, Ex. 1.) Shipments coming from this point which form the basis of the several counts of the complaint were transported from Herlong, California, to Oakland or San Francisco, California, via the lines of Wells Cargo, Inc., a connecting motor carrier. (Tr. 200-201.) At Oakland or San Francisco, California, the freight was turned over to the defendant for transportation beyond to Oregon and Washington points. (Tr. 47.) The transportation of all or a part of the items comprising 13 such shipments by the appellant from these California points to points in Oregon and Washington form the basis of the counts of the information which form the basis of the appeal.

b. Statement of the questions involved and the manner in which they are raised.

There are three basic questions raised on the appeal. The first is the propriety of the action of the District Court in admitting into evidence certain exhibits and of denying a subsequent motion to strike such exhibits from the record. The admissibility of the documents was placed in issue by objection of the defendant seasonably made. (Tr. 35-43, 44-45.) The documents were also the subject of a motion to strike. (Tr. 150-155.)

The second basic issue is the sufficiency of the evidence to establish (a) the character and dangerous properties of the merchandise allegedly transported, (b) the sufficiency of the evidence to prove the fact of transportation of a "dangerous" commodity, and (c) the sufficiency of the evidence to establish the "willful" character of appellant's acts. This issue was raised by a motion for acquittal and is now raised by appeal from the final judgment. (Tr. 149.)

The third basic issue is the jurisdictional question of the applicability of the so-called "primary jurisdiction" doctrine to the fact situation here presented. This issue was presented in the form of a motion to dismiss or for acquittal as the Court might deem proper at the conclusion of the case of the United States. (Tr. 149.) The essence of this issue is that the words "except dangerous explosives" as used in the certificate of the appellant are words used in a technical and special sense requiring a determination of special meaning as

a matter of fact; that, under the "primary jurisdiction" doctrine, the meaning of that term as used in appellant's certificate must be fixed by the Interstate Commerce Commission in the first instance.

c. Summary of the evidence directly related to the issues raised on appeal.

An effort will be made in the summary of the evidence to bring together under separate subject heading the evidence with respect to each of the basic issues. In some instances the same evidence pertains to more than one issue. Duplications of statements will be avoided so far as it is possible to do so.

1. The evidence relating to the admissibility of the exhibits and their relevancy.

The sole witness called by the United States was Mr. William L. Harrison, an attorney employed by the Interstate Commerce Commission, Bureau of Motor Carriers. (Tr. 17.) Mr. Harrison's testimony was based upon two investigations made by him at the general offices of appellant in Seattle, Washington, about March 15 and May 1, 1951. (Tr. 50.) On these visits Mr. Harrison talked with a Mr. Gottstein and Mr. Castellano. (Tr. 71.) Mr. Gottstein was a file clerk in charge of government traffic. (Tr. 71.) Mr. Castellano was an employee of the appellant in charge of certain trip report records. From Mr. Gottstein the witness Harrison secured photostatic copies of freight bills taken from the files of the appellant. (Tr. 34.) These photostatic copies are Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22 (hereafter in this brief referred

to collectively as Exhibits 3-22 inclusive in the interest of brevity). Exhibit 4 includes also a correction freight bill and a copy of a government bill of lading. (Tr. 45-47.) No question is here raised by virtue of the fact that the exhibits are photostatic copies. (Tr. 32.)

Mr. Harrison made certain notes from his examination of the trip reports and testified in the proceeding as to the movement of vehicles from those notes. (Tr. 54, 55.) These trip reports consist simply of a driver's record of vehicle movement in terms of time and place. (Tr. 53.) They do not reflect any information with respect to the goods transported. (Tr. 70.)

Mr. Harrison's information as to Exhibits 3-22 inclusive was based entirely upon such data as he derived from the face of the document and from statements to him by Mr. Gottstein. (Tr. 71, 50-51.) Mr. Gottstein's information was likewise derived exclusively from the face of the exhibits. He had no personal knowledge of the facts therein reflected. (Tr. 71, 50-51.)

With one exception Mr. Harrison did not examine any of the bills of lading which may have been issued by the government with respect to the shipments involved. (Tr. 123.) He did examine the bill of lading which constitutes a part of Exhibit 4. (Tr. 123.) At the time of the investigations, in the spring of 1951, such copies of bills of lading as might have come into the possession of the appellant had apparently been forwarded to the government in connection with the claim for payment of charges. (Tr. 123.)

The only evidence produced by the United States prior to the offer of the documents in evidence and to the motion to strike relating to their source or their preparation was the statement of Mr. Harrison that the documents were secured from the files of the appellant and that appellant, as a carrier, is required to make freight bills covering its transactions. (Tr. 32, 34.)

The testimony of witnesses for the defendant throws some further light upon the source of these documents. Freight bills of the type involved are generally prepared by the traffic department of the originating station. (Tr. 179.) This traffic department operates under the general supervision of the traffic department in Seattle, Washington. (Tr. 171.) The general manager of the Oakland terminal of appellant indicated that, to the best of his knowledge, the information appearing on the freight bills comprising Exhibits 3-22 inclusive was taken from freight bills of Wells Cargo, Inc. (the originating carrier) or from the government bill of lading. (Tr. 160-161) These matters, however, were not under his supervision or direction. (Tr. 169, 171.) The general traffic manager of appellant (Mr. Shepherd) under whose direction the issuance of such documents came, indicated he was not personally familiar with any particular shipments involved, but did indicate that with some frequency his company did not have access to the government bills of lading either because they did not accompany the shipment or because they were presented under seal so as to prevent examination. (Tr. 198.)

As a result of these circumstances the freight bills on government traffic were sometimes cut either from information on the bill of lading of the originating carrier or the freight bill of that concern. (Tr. 198.)

It should be noted in this connection that Exhibit 5 and appellant's Exhibit A reflect a situation in which it appears that two government freight bills were involved. Only one of these appears to have reached the appellant, at least so far as its records reflect. (Tr. 200-201.) This bill does not reflect the commodity which is the subject of the complaint (Count 3). The only document reflecting this item is a document purporting to be a bill of lading of the originating carrier. (Ex. A, Tr. 200-201.) As to what the facts may be with respect to the specific source of information contained in Exhibits 3-22 inclusive (other than Exhibit 5) the record is silent.

The record reflects that it was the custom and practice of the appellant on ordinary commercial shipments to check the commodities loaded on vehicles against the bill of lading for that shipment. (Tr. 170.) The freight bill is cut only after this check has been completed. (Tr. 170.) All of the shipments which are involved here came to the appellant in vehicles sealed by the government. (Tr. 117, 157.) No member of the appellant's organization was given any opportunity to check the contents of the vehicles against any shipping documents because of the fact that the appellant was not permitted to break the government seals. (Tr. 169-170.)

2. The substantive evidence with respect to the elements of the several offenses.

To establish what was actually in the particular trucks of the appellant the United States relies entirely upon Exhibits 3-22 inclusive. Except as to Counts 2 and 3, the documents consist solely of copies of freight bills. As to the two counts the evidence reflects also copies of bills of lading either of the government or of the initiating carrier. (Ex. 4, Ex. 5, Ex. A.) The only other evidence pertaining to the movement of appellant's trucks is testimony of Mr. Harrison relating to information obtained from certain trip reports. These reports do not reflect any information as to what was in the trucks. (Tr. 70.)

These trucks all came to the defendant physically sealed so as to prevent examination and direct knowledge of the contents. (Tr. 169-170.) They were received by the appellant from another motor carrier who in turn received them in a sealed condition from the government authorities at Herlong, California. (Tr. 125.) We know that as to two of the counts a bill of lading was prepared either by the government or by Wells Cargo, Inc., describing the commodity in a certain fashion. (Ex. 4, Ex. A.) Beyond this there is no direct evidence as to what was the source of the information on the freight bills. Mr. Harrison did not compare these freight bills with any bills of lading (other than as to Ex. 4.) (Tr. 123.) The evidence is entirely silent as to the source of information with respect to the commodity as to the initiating carrier. No

witness was called by the United States to testify to any facts with respect to the actual loading of these vehicles or to the practice of loading. No evidence is shown of the procedures followed by the government in determining the description of the commodity. Beyond the description by class in the Exhibits there is no evidence of what the particular products may have been.

To prove that the commodities transported were explosives and that they were dangerous the United States relied again exclusively upon documentary evidence. Mr. Harrison was not an authority on explosives. (Tr. 101.) Exhibits 23 and 24 were introduced for the purpose, among others, of proving the explosive and dangerous character of the commodities. It was agreed between counsel that these exhibits reflected in substantial form regulations promulgated by the Interstate Commerce Commission appearing in the Federal Register pursuant to the provisions of an act governing the transportation of explosives and other dangerous articles (18 U.S.C.A. §835). (Tr. 68-86.) The exhibits also constitute a tariff to which the appellant is a party to the extent of its authorization. (Ex. 23, Ex. 24.) As to the matter of the definitions of the characteristics of the different items described in the freight bills, Exhibit 23 represented the effective regulations at the time the transportation was performed. (Tr. 88-91.) The effective date of these regulations as shown by the Federal Register was May 3, 1950. (Tr. 90.) Exhibit 6 represents a state-

ment of the regulations in effect prior to that date. (Tr. 90-91.)

It will be necessary in the course of the argument to discuss certain portions of Exhibits 23 and 24 in some detail. To avoid duplication of statement appellant here simply calls attention to the fact that the portions of Exhibit 23 undertaking to define and classify explosives of various categories are contained in Sections 75.50 through 73.109 appearing on pages 35 to 46, inclusive, of the exhibit. In Exhibit 23 (the superceded regulations) the sections dealing with classification and definition appear in Sections 50 through 75 on pages 38 to 48 of Exhibit 23.

Comparison of the cited sections of Exhibits 23 and 24 will reflect some rather substantial changes both in terminology and definition as well as in the pattern of classification. In Exhibit 23 explosives are divided into two classes, i.e., forbidden explosives (§73.51) and acceptable explosives (§73.52). The latter type is further subdivided into three classes as follows: "(1) Class A explosives; detonating or otherwise of maximum hazard; (2) Class B explosives; flammable hazard; (3) Class C explosives; minimum hazard." (Ex. 23, §73.52.) Section 73.53 undertakes to define Class A explosives. Section 73.88 undertakes to define Class B explosives. Section 73.100 undertakes to define Class C explosives. As more fully appears from these definitions whether or not a particular article falls within one classification or another as a matter of fact depends upon the reaction of the explosive material when

subjected to particular tests (generally devised by the Bureau of Explosives) (Ex. 73, 53), or to the nature of the product as being primarily combustible rather than detonating. (Ex. 23, §83.88.) In some instances the character is fixed as Class C simply because the quantity of explosive material in the given container is present in restricted quantities. (Ex. 23, §73.100).

No effort was made by the United States to introduce direct evidence as to the specific ingredients or specific explosive properties of any of the commodities allegedly transported. The United States relies entirely for the proof of the dangerous character of the articles upon the fact that certain language is used in Exhibits 3-22 inclusive and that the same or similar language appears in Exhibits 23 and 24 under the classification of an acceptable explosive Class A or Class B.

In this connection the attention of the Court is called to the fact that the language used in Exhibits 3-22 inclusive is defined in Exhibit 23 in such terms that, in each instance, the designation embraces a group or class of products having certain common characteristics. For example, "Ammunition for Cannon" as defined in Exhibit 23 embraces any "fixed, semi-fixed or separate loading ammunition which is fired from a cannon, mortar, gun or howitzer." (Ex. 23, §73.53(1).) Obviously these words could be used to describe a wide range of different specific products any one of which might have explosive properties differing from all others within the general class. The

words were not selected by appellant since it was prevented by the seals upon the vehicles from making any examination of the contents. (Tr. 125.) Who may have determined that the words used were an appropriate description by class of the specific items transported, the record does not reveal. Neither does it disclose anything with respect to the competency of the person, whoever it may have been, to make the classification in the first instance.

3. The evidence relating to the definition of the term "dangerous explosive" as used in the certificate of the appellant.

Appellant has authority from the Interstate Commerce Commission to transport between the points here involved "general commodities . . . except dangerous explosives." (Ex. 1.) The language used is that of the Interstate Commerce Commission. (Ex. 1.) Appellant urged by motion to dismiss and motion for acquittal made to the District Court that the term "except dangerous explosives" as used in the certificate of the appellant is a term used in a technical sense and as a word of art and that under the so-called "primary jurisdiction" doctrine a question of fact as to the meaning of the term exists which can be decided in the first instance only by the Interstate Commerce Commission. Considerable testimony at the trial was directed to this issue.

The District Court judge indicated during the trial: "To my mind, all explosives are dangerous." (Tr. 110.) It was the testimony of Mr. Harrison, an attor-

ney for the Interstate Commerce Commission, that the words "dangerous explosives" and "explosives" as used by the Interstate Commerce Commission in certificates were not synonymous terms. (Tr. 98.) The fact that both terms are used in different parts of the appellant's certificate bears out this statement. (Ex. 1.) It was further the opinion of Mr. Harrison that if an explosive fell under "Class C" as defined in Exhibit 23 it would not be a "dangerous explosive." (Tr. 104.) A particular item might be classified as "dangerous" at one time and subsequently changed by the change in regulations so as to be removed from that class. (Tr. 104.)

Exhibit 23 (the effective regulations) and Exhibit 24 (the superseded regulations(differ in a number of respects. In Exhibit 24, Class A, Class B and Class C exposives include in the basic classification the words "dangerous," "less dangerous," and "relatively safe" respectively. (Ex. 4, §51, p. 38.) These words were deleted in the amendment of the regulations made effective May 3, 1950. (Ex. 23, §73.52, p. 35, Tr. 90.) Substantive changes in definitions of the type of articles to be included within a particular class were also made. (Compare definition of "Ammunition for Cannon." (Ex. 23, §73.53(1) and Ex. 24, §54, as an example in point.)

Nowhere in the definition of terms in the regulations effective at the time the shipments moved is there any use of the word "dangerous" as defining a particular class or kind of explosive. (Tr. 93.) It is true that at the time the regulations described in Exhibit 24 were

in effect the Interstate Commerce Commission in a case entitled *Strickland Transportation, Inc.—Extension—Dangerous Explosives,* 49 M.C.C. 595 (1949), stated that the term "dangerous explosives" as used in a certificate should be construed to include only those explosives described as "dangerous" or "less dangerous" in the regulations set forth in Exhibit 24. (Tr. 9596.) The words used by the Interstate Commerce in the *Strickland* case were, however, deleted from the regulations by the amendment of May 3, 1950. (Tr. 88-91, Ex. 23, Ex. 24.)

Mr. Shepherd, the traffic manager of defendant for some seven years, indicated in response to questions by the Court that he had difficulty in knowing what were "dangerous explosives" within the meaning of the certificate. (Tr. 207.) Mr. Harrison, who conducted the investigations preceding the filing of the information was careful to state that any advice he gave the appellant with respect to the classification of items shipped was his personal judgment rather than an attempt to express a ruling of the Commission. (Tr. 78-79.)

To set forth fully the evidence demonstrating the lack of clarity of the language in appellant's certificate and the technical character of the fact issue which the definition of the certificate presents would require many pages. In the limits of the space allowed on Brief examples only can be cited.

In Count 17 and in Exhibit 19 the article transported is described as "Rocket Ammunition *for cannon*

with Empty Projectiles." (Emphasis added.) Section 73.53 of Exhibit 23 defines rocket ammunition as being "fixed ammunition which is fired from a tube, launcher, rails, trough, or other device *as distinguished from a cannon, gun or mortar.* (Emphasis added.) (Ex. 23, §73.53(p).) Nowhere in Exhibit 23 is any commodity described which fits the language used in Exhibit 19.

Mention has previously been made of the definition in Exhibit 23 of ammunition for cannon. In Exhibit 24, the superseded regulations, it was necessary, in order to qualify as such, that the projectile be designed for a 37 millimeter or larger weapon. (Ex. 24, §54.)

The foregoing examples give some indication of the problem of specific classification from the regulations themselves. In the course of the argument directed to the application of the "primary jurisdiction" doctrine examples related to the larger question of the sufficiency of the regulations generally as an aid to definition will be cited.

4. The evidence bearing upon the willful and knowing character of the acts of appellant in performing transportation.

Before handling any traffic of any kind from the Sierra Army Ordnance Depot at Herlong, California, appellant submitted a copy of its certificate to the appropriate military authorities in Washington, D. C. (Tr. 183.) Appellant was subsequently tendered freight coming from Herlong, California. (Tr. 185.) Included in the freight handled were many explosive

items which Mr. Harrison considered did not fall within the prohibition of the certificate. (Tr. 104-105.) When it came to the attention of Mr. Shepherd that explosive items were moving, he undertook an examination of the Commission regulations. (Tr. 188.) Finding that the regulations (Ex. 23) did not define "dangerous explosives" he sought opinion of Mr. William B. Adams, an attorney at Portland, Oregon. (Tr. 188.) Mr. Adams was unable to determine with any degree of definiteness what was included within the meaning of the term "dangerous explosives." (Tr. 189.) On October 25, 1950, an application was filed with the Interstate Commerce Commission for removal of the restrictive language from the certificate. (Ex. 2, Tr. 20-24.) The hearing before the Commission took place April 26, 1951. In this hearing Mr. Shepherd testified that the application was presented to clarify the confusing language in the certificate. (Tr. 193.)

Mr. Harrison indicated that his investigations were made in March and May respectively of 1951. (Tr. 50.) All representatives of the appellant were cooperative. No attempt at concealment of what had been done was made. (Tr. 78.) At the time of these investigations Mr. Harrison first advised the appellant that he considered the transportation improper. (Tr. 78.) Even then he expressed these thoughts as a personal opinion. (Tr. 78.) It will be noted that the last shipment reflected by the information moved on May 6, 1951. To the best of Mr. Harrison's knowledge the Interstate Commerce Commission gave no notice to the

defendant that its actions were considered improper prior to the time the information was filed. (Tr. 79.)

The issue presented is whether or not, in view of the course of conduct of appellant and the confusing status of the regulations, the appellant's conduct can be construed as willful and knowing violation of the law.

III.

SPECIFICATION OF ERRORS RELIED UPON

Number One: The judgment as to each of the counts of the information is contrary to law in that the Court undertook to make an independent finding of fact as to the meaning of the words "except dangerous explosives" as used in the certificate of public convenience and necessity issued to the appellant by the Interstate Commerce Commission contrary to established rules of law that the primary jurisdiction to define said words is in the Interstate Commerce Commission.

Number Two: The judgment as to each of the counts of the information is contrary to law in that the words "except dangerous explosives" as used in the certificate of appellant are used in a technical sense and the evidence fails to establish that at the time the alleged transportation was performed said words had been defined with sufficient certainty to put the appellant on notice that its actions would constitute a criminal offense.

Number Three: The trial court committed prejudicial error by receiving in evidence over the objection

of the appellant Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22.

The original of the several exhibits are made a part of the record on appeal by stipulation of counsel. (Tr. 213-214.) Testimony pertaining to the introduction of the exhibits appears at pages 32 to 45 inclusive of the Transcript of Record on Appeal. The ruling of the Court appears at page 45 of the transcript. The objection of counsel to the introduction of the exhibits was in the following language.

> "But I think the case is significant and does support the objection which we make here, that the documents are hearsay and that they are not the best evidence of the fact with respect to the character of the transportation." (Tr. 39.)

Further the objection was stated as follows as to all of the exhibits:

> "In order that the record may be clear, may the record show my objection on the ground of hearsay, and no proper foundation laid." (Tr. 45.)

Number Four: The trial court committed prejudicial error in denying the motion of the appellant to strike from the evidence Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22.

The exhibits are the same as those described in Specification of Errors Relied Upon, Number Three, above. The motion to strike and the ruling thereon appears at pages 153 to 155 of the Transcript of Record

on Appeal. The language of the motion as stated by Counsel for appellant is as follows:

> " . . . I therefore in accordance with the permission that was given by the Court make at this time the motion to strike Exhibits 3 through 22, both inclusive, and the testimony of Mr. Harrison, with respect to those exhibits as to anything that they may show, his testimony as to what they reflect, as being hearsay in this proceeding, incompetent, irrelevant and immaterial, and failing to establish as proper evidence the fact of transportation." (Tr. 153-154.)
>
> Also: "If the Court please, at the conclusion of my statement yesterday, just before the interruption, I had made a statement of a motion to strike in addition, the documents on the failure to establish the foundation, and on the ground that they called for hearsay under the—
>
> THE COURT: I think you covered that.
>
> MR. RUSSELL: Well—
>
> THE COURT: If you did not, I will allow you for the purpose of the record to make a general objection." (Tr. 154.)

Number Five: The judgment as to each count of the information is contrary to the evidence in that the evidence fails to establish (a) the fact as to what specific products were transported, and (b) the fact as to the dangerous explosive characteristics of such articles.

Number Six: The judgment as to each count of the information is contrary to the evidence in that the evi-

dence fails to establish that any transportation which may have been performed by appellant was "willful" within the meaning of the term as used in statutes under which appellant is charged.

IV.

ARGUMENT IN SUPPORT OF SPECIFICATIONS OF ERROR

A. The Argument Relating to the "Primary Jurisdiction" Question. (Specificaton of Error Number One).

1. Summary of the Argument.

Congress has delegated to the Interstate Commerce Commission the certification and regulation of motor carriers of property for hire. Appellant holds a certificate of public convenience and necessity issued by such Commission. This certificate as it relates to counts of the information authorizes the transportation of "commodities generally . . . except dangerous explosives." (Ex. 1.) The evidence demonstrates that the words "except dangerous explosives" as used by said Commission in the certificate of appellant are used in a technical sense and as words of art having other than a common and ordinary meaning. The meaning of these words as used in the certificate has not been defined with certainty by the Interstate Commerce Commission. There is presented, therefore, the question of fact as to what particular types and kind of explosive items fall within the meaning of the term "dangerous explosives" as used in the certificate. The

Congress has delegated to the Interstate Commerce Commission as an expert administrative agency the determination of the technical questions presented. Under the circumstances the "primary jurisdiction" to define and find as a fact the meaning of the technical term "except dangerous explosives" rests with the Interstate Commerce Commission. The District Court should not have undertaken to make the finding of fact as to the meaning of the term in the absence of a prior clear and certain definition thereof by the Interstate Commerce Commission.

2. Statement of the Argument.

Pursuant to the provisions of the Interstate Commerce Act, Part II (49 U.S.C.A. §300-327 inc.) Congress has delegated to the Interstate Commerce Commission the matter of the certification and regulation of motor carriers engaged in interstate commerce. These statutory provisions delegate to the said Commission the power and right to make classification of types of service.

Interstate Commerce Act, Part II (49 U.S.C.A. §308).

The statute in question also gives to the Interstate Commerce Commission the power to issue certificates of public convenience and necessity and to prescribe terms and conditions in connection therewith.

Interstate Commerce Act, Part II, (49 U.S.C.A. §306(a)).

The scope of the certificate to be granted to a particular carrier entails weighing of evidence and the exercise of expert judgment, a function reserved exclusively for the Commission.

See:

United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 480, 62 S. Ct. 722, 86 L. Ed. 971 (1941).

In the exercise of this function the Commission has issued to the appellant a certificate which provides, so far as pertinent here, that the appellant has authority to transport over the routes described "general commodities . . . except dangerous explosives." (Ex. 1.) Since the appellant is authorized to transport commodities generally the authority to handle and transport the items of property described in the several counts of the information exists under the certificate unless these items of property must be deemed to fall within the exception noted. (Tr. 141.) The unlawful acts, if any, do not arise from the mere fact of transportation but from the transportation of property of a particular class and kind.

The several counts of the complaint allege the transportation of the following items: Detonating fuses; explosive projectile for cannon; rocket ammunition with empty projectiles; ammunition for cannon with explosive projectiles; hand grenades; rocket ammunition for cannon with empty projectiles; and black power. These items are similarly described in the only

evidence of record purporting to establish the fact of transportation. Since the particular items described are not set forth in the certificate their transportation becomes unlawful only if it can be said that they have the physical characteristics of a "dangerous explosive" as that term is used in the certificate which the appellant holds. Inevitably, therefore, the question must first be answered, "What do these words mean?"

Pursuant to a principle of law which has come to be known as the "primary jurisdiction doctrine" first announced in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907), the United States Supreme Court has held that in situations of the general type here presented primary resort to the Interstate Commerce Commission is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission.

See:

Great Northern Railway Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1921).

The case last cited undertakes to set out and distinguish the different basic problems which are presented. Justice Brandies, speaking for the Supreme Court, points out in the cited case first of all that "it is not the character of the function but the character of the controverted question and the nature of the inquiry

necessary to its solution which requires that it be preliminarily decided by the administrative body." (*Great Northern Railway Co. v. Merchant's Elevator Co.,* supra (L. Ed. p. 946). Where words of the written instrument are used in their ordinary meaning, their construction presents a question solely of law. This function the Courts can perform without resort to the Commission.

Where, however, words are given a particular meaning it becomes necessary to determine the meaning of the words used in the document. This applies to technical words or phrases not commonly understood or to words having a trade meaning. Where such a situation arises and the peculiar meaning or particular usage is proved by evidence there must be a finding of fact as to the scope of the meaning before construction of the instrument can follow. In the latter situation "preliminary determination must be made by the Commission, and not until this determination has been made can a court take jurisdiction of the controversy."

Great Northern Railway Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1921);

Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1914);

Director General v. Viscose Company, 254 U. S. 498, 41 S. Ct. 151, 65 L. Ed. 372 (1921);

Armour & Co. v. Alton R. Co., 312 U. S. 195, 61 S. Ct. 408, 85 L. Ed. 771 (1941);

Trans-Pacific Airlines, Ltd. v. Hawaiian Air Lines, Ltd., 174 Fed. (2d) 63, (C.C.A. 9th Circuit) (1949);

Hancock Mfg. Co. v. United States, 155 Fed. (2d) 827 (C.C.A. 6th Circuit) (1946).

In the case of *Trans-Pacific Airlines, Ltd. v. Hawaiian Air Lines, Ltd.,* supra, p. 66, this Court set forth the distinction between the situations involved as follows:

> "Where the application of the administrative regulation is clear and no special familiarity with the complicated factual situations peculiar to the field is imposed, and no determination of direction is required, the courts will proceed. (*Great Northern Railway Company v. Merchant's Elevator Company,* 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943.) On the other hand, prior to judicial intervention, problems which involve expert knowledge of multitudinous detail of intricate nature in a technical field require that recourse should be had to administrative bodies. Especially is this true where uniformity of interpretation of rules and consistency of application, in view of overall policy, is compelled by the legislative mandate. Then is there not only a commitment of primary, but likewise of exclusive, jurisdiction to the administrative, and exhaustion of the remedies is mandatory." (p. 66.)

The cited case was similar in many respects to the fact situation here presented, particularly in that it in-

volved a claim of carrier operation without appropriate certificate.

It will be helpful to examine the facts before the Court in this action in light of the language used by this Court in the quotation just made.

1. Is the "application of the administrative regulations" clear?

At the very threshold of this discussion the question is raised as to what the "regulations" are. The certificate itself may be considered to qualify in this category. Examination of the certificate reflects no amplification or explanation of the phrase "except dangerous explosives." At another point in the certificate an exception to a general commodity authority is stated "except . . . explosives, or dangerous substances." The qualifying word "dangerous" must indicate, therefore, that "dangerous explosives" and "explosives" are not synonymous terms. (Tr. 98.) The certificate itsef confuses rather than clarifies.

The United States cites certain regulations issued by the Interstate Commerce Commission as controlling. These regulations are set forth in Exhibits 23 and 24. Exhibit 23 reflects the effective regulations at the time the shipments moved. Exhibit 24 reflects the regulations as they existed prior thereto. It is to be noted that these regulations are issued by the Interstate Commerce Commission, not pursuant to its authority under the Interstate Commerce Act, *but pursuant to a special authority granted by Congress in connection with other statutes.* (18 U.S.C.A. §835.)

The regulations apply to all types of carriers and to shippers. A question therefore arises as to whether regulations issued pursuant to one statutory authority dealing with the subject of explosives can be taken as a proper basis for interpretation used in a certificate issued pursuant to another statute. Even if it is decided that these regulations can be so used, such decision is a determination of that fact which can only be made from sources other than the statutes and the regulations themselves. A different basic purpose is involved in the statute resulting in the certificate and in the statute resulting in the regulations. Different considerations may well be involved as to the classification of a particular product when the question is one simply of packaging and the manner of handling in course of transit from those involved in determining what items are safe for transportation at all. The purpose of the regulations and their statutory source prevent a declaration that the "application of the administrative regulations" is clear.

Even if it be assumed the regulations are applicable for purposes of assisting in the definition of the certificate, they are not sufficiently clear to avoid the necessity for a preliminary administrative determination.

The regulations in force at the time these shipments moved divide explosives into two categories—"forbidden" and "acceptable". Ex. 23, §73.51, §73.52.) All of the items allegedly transported by appellant are classified in these regulations as "acceptable". (Ex. 23, §73.53, §73.88.) Section 73.801 (dealing particularly

with the application of regulations to motor carriers) states in part, "Explosives and other dangerous articles, except such as may not be accepted and transported under Parts 71-78, may be accepted and transported by common and contract carriers by motor vehicle engaged in interstate or foreign commerce . . ." Section 77.822(a) also states in part, "Any motor carrier may accept for transportation or transport any acceptable explosive or other dangerous artices listed in the Commodity List, §75.5. . . ."[2]

The presence of these sections in the regulations, coupled with the division of explosives into forbidden and aceptable groups, at once raises the question as to whether or not the words "except dangerous explosives" as used in the certificate was intended simply to carry into the certificate the admonition of the regulations against the handling of non-acceptable explosives by motor carriers. At the very least, a serious question of the clarity of the application of the regulations is raised.

Even if it is assumed that the several regulations defining and classifying acceptable explosives must be considered as applicable for purposes of interpretation of the certificate, confusion still exists. Exhibit 23 setting forth the regulations applicable at the time the transportation was performed, nowhere uses the words "dangerous" or "less dangerous" in the provisions undertaking to define the several classes. (Ex. 23, §73.52, §73.53, §73.88, §73.100.) The confusion is in-

[2]For full text of Sections 77.801 and 77.822(a) see Appendix I, Item No. 1.

creased by comparison of the effective regulations in Exhibit 23 with those formerly in force as set out in Exhibit 24. The comparable sections of the last mentioned exhibit do contain the words "dangerous" and "less dangerous". Ex. 24, § 51.) They were eliminated in the changes in the regulations made effective May 3, 1950. (Tr. 90.) How can it be said that the change in langauge had no effect upon the meaning of words used in certificates without speculation upon the intent and purpose of the Interstate Commerce Commission in making the changes noted?

Even the superceded regulations indicate that there are variations in the dangerous character of explosive items (Ex. 24, §51.) Defendant has been convicted for the alleged transportation of some items which formerly fell in the "less dangerous" category. (Ex. 24, §63A.) Can it be said that the regulations are sufficiently clear to be sure that the word "dangerous" as used in the certificate was intended by the Commission to include also items described as "less dangerous"?

A detailed examination of the provisions of the several specific sections dealing with the particular items which form the basis of the information will develop additional examples to illustrate the difficulty of attempting to hold that the regulations are clear and certain as applied to the issue. It should be sufficient to mention here that comparison of Exhibit 23 and Exhibit 24 demonstrates numerous changes in the arrangement, definition and classification of the several items here specifically involved. It is respectfully

submitted that it is impossible to ascertain from the effective regulations just what is connoted by the term "dangerous explosives" as contained in the appellant's certificate.

A third possible source of a "regulation" which might determine the interpretation of the certificate is to be found in the decisions of the Interstate Commerce Commission. It would appear that there is only one decision of that body which might possibly so qualify. (Tr. 108.) The case is that of *Strickland Transportation, Inc.—Extension—Dangerous Explosives,* 49 M. C. C. 595 (Aug. 1949). It will first be noted that this decision is by a Division of the Commission and not one of the entire Commission. In that case Division 5 of the Interstate Commerce Commission stated that "a carrier authorized to transport general commodities except 'dangerous explosives' lawfully can transport those explosives which the Commission has classified 'relatively safe' but not those which it has classified as 'dangerous' whether more dangerous or less dangerous." (601.)[3]

We are concerned here with the applicability of the "primary jurisdiction" doctrine. The United States Supreme Court has held in a number of cases that determinations in decisions of the Interstate Commerce Commission and other administrative agencies dealing generally with the subject under consideration in the particular case do not preclude the necessity for the

[3]For full statement of the pertinent portion of the opinion see Appendix I, Item No. 2.

application of the doctrine where it is otherwise called for.

Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 928, 57 L. Ed. 1494 (1913);

Midland Valley R. Co. v. Barkeley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664 (1927);

U. S. Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932);

St. Louis B & M R. Co. v. Brownsville Nav. Dist., 304 U. S. 295, 58 S. Ct. 868, 82 L. Ed. 1357 (1937).

In determining the sufficiency of the *Strickland* case, *supra,* as a regulation of the Interstate Commerce Commission defining the scope of the appellant's certificate, consideration must be given to the fact that subsequent to the issuance of that decision changes were made by the Commission in the regulations to which the decision refers. (Ex. 23, Ex. 24, Tr. 90.) The *Strickland* case was decided in 1949. On May 3, 1950 the Interstate Commerce Commission amended the regulations, as has been noted, to delete from them the words "dangerous" and "less dangerous" (the words of reference used in the case). (Tr. 90, Ex. 23, §73.52.) Before it can be said that this case continues to be applicable to the factual situation herein presented, it is first necessary to make two assumptions: (a) that the words "dangerous" and "less dangerous" as used in the cited case were used by Division 5 as synonymous

with "Class A" and "Class B"; and, (b) that the rather extensive amendments to the particular portions of the regulations (including the deletion of the specific words used) had no significance so far as interpretation of certificates is concerned. It is impossible from any facts here presented to determine the accuracy of either of the assumptions. The cited decision, like the certificate and the regulations, falls short of being a clear administrative regulation.

2. Is "special familiarity with the complicated factual situations peculiar to the field" imposed?

The statute, by virtue of which the regulations governing the transportation of explosives are issued, expressly recognizes the complicated character of the problems presented. In addition to delegating to the Interstate Commerce Commission the task of formulating such regulations the Congress states in the statute that the Commission may call upon the Bureau of Explosives and other government agencies for assistance. (18 U.S.C.A. §835.) It is only necessary to compare Exhibits 23 and 24 to recognize that the properties which establish the relative transportation hazards of explosive articles are many and varied. Exhibit 23, §73.53 undertakes to define explosives of a particular class both in terms of the reaction to certain detailed tests and in terms of the adaptability of the product for an intended use. Certainly highly technical knowledge is required to know and understand what the properties of an article are which will cause it to be detonated by a No. 8 blasting cap or by a drop of less

than 4 inches in the Bureau of Explosives, Impact Apparatus. (Ex. 23, §73.53(a) to (h) inclusive.) Similarly, the distinction for purposes of definition between a "gun" and "small arms" calls for highly specialized knowledge. All of these factors enter into the determination as to what is meant by the term "dangerous explosives" as used in the certificate of appellant.

The technical problems presented are two-fold: (1) Which of the many explosives items listed in the extensive regulations fall within the category of "dangerous" as the term is used in the certificate? (2) What are the properties of a specific item transported to make it qualify as falling in a category generally designated as "dangerous"? Differences can and may well exist between the considerations relating to packaging and shipping which are the direct subject of the regulations and considerations relating to the authority as such to transport under the certificate. The regulations specifically indicate that all of the products designated in the several counts of the information are sufficiently safe for transportation to be "acceptable" for handling by motor carriers. (§77.801, Ex. 23.) The factors, if any, that may call for a different standard of measurement for determining the conditions under which a motor carrier should be denied the right to carry the goods despite these regulations (i.e., to have them "excepted" in a certificate) most certainly call for the expert judgment and special knowledge it is the function of the Interstate Commerce Commission to provide.

3. Is the situation one in which the problems raised "involve expert knowledge of multitudinous detail of intricate nature in a technical field"?

Applicant respectfully submits that what has been said above clearly demonstrates the highly technical nature of the inquiry involved in determining the meaning of the words "dangerous explosives". The Trial Court seemed to be of the opinion that all explosives are dangerous. (Tr. 110.) The attorney for the Interstate Commerce Commission who testified gave it as his opinion that the phrase in issue did not include "Class C" explosives. The regulations upon which the United States relies and the statute authorizing them speak of "explosives and *other* dangerous articles". (Emphasis added.) (Ex. 23, 18 U.S.C.A. §835.) The factors which produce the conclusion that Class C explosives are not "dangerous" within the meaning of that language as used in a certificate call for highly specialized knowledge and information.

Count 17 describes "rocket ammunition for cannon with explosive projectiles". In Exhibit 23 the regulations define rocket ammunition as ammunition designed to be fired from launches and other devices but not from cannon. No product exactly fitting the description used either in the Count of the information or in Exhibit 19 appears anywhere in the document. In what classification is this item then to be deemed to fall? Certainly the situation is one in which multitudinous detail in a technical field is involved.

4. Is the question one where the uniformity of interpretation of rules and consistency of interpretation are required?

No citation of authority should be required to support the proposition that it is imperative that all certificates containing the same language should be given the same interpretation. Confusion would most certainly result if the interpretation of the meaning of the words "except dangerous explosives" were left to the individual judgment of different courts and different juries. Appellant could well find itself in a position in which its certificate would mean different things depending upon the judicial district in which the operation was performed.

The situation here is to be distinguished from that in which the only problem presented is the application of a clear and certain rule. The distinction between interpretation and mere application is a basic test for application of the primary jurisdiction doctrine.

Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915);

Pennsylvania R. Co. v. Sonman Shaft Coal Co., 242 U. S. 120, 37 S. Ct. 46, 61 L. Ed. 188 (1916);

Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed 999 (1931);

Trans-Pacific Airlines, Ltd. v. Hawaiian Air Lines, Ltd., 174 Fed. (2d) 63 (C.C.A. 9th Cir. 1949);

Civil Aeronautics Board, et al. v. Modern Air Transport, Inc., 179 Fed. (2d) 622 (C. C. A. 9th Cir. 1949).

The case last cited presents a good example of the distinction which exists. There the sole question was the application of a set of rules specifically applying to the situation presented. No technical questions were involved. In the instant case, however, the meaning of the term involved is not clear. Examination of the regulations only adds to the questions and confusion. The meaning of the language used cannot be ascertained by mere reference to a dictionary or to the commonly understood usage of the words. Different judges upon the same record might, with good reasons, arrive at different results. If the certificate of appellant and all other certificates containing similar language are to be given the same meaning it is imperative that there be a clear and unequivocal determination of the meaning of the language by the Interstate Commerce Commission. It is respectfully urged that the case is a proper one for the application of the "primary jurisdiction doctrine".

The doctrine applies to criminal proceedings as well as in civil matters.

United States v. Pacific & Arctic R. & N. Co., 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742 (1913);

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827 (C. C. A. 6th 1946).

Since this is a criminal case the District Court should be directed to dismiss the action if the doctrine is found to be applicable.

Hancock Manufacturing Co., v. United States, 155 Fed. (2d) 827 (C.C.A. 6th 1946).[4]

B. The Argument Directed to the Question of the Certainty in Language in Defendant's Certificate to Give Notice to it of the Commodities Which Might and Might Not Be Transported Thereunder. (Specification of Error Number Two).

1. Summary of the Argument.

Federal Courts do not recognize the existence of a "constructive offense". The Interstate Commerce Act gives to the Interstate Commerce Commission a number of different remedies for correcting improper activities by a carrier allegedly violating its certificate. Appellant should not be criminally prosecuted and convicted for unlawful transportation of property unless it appears that at the time of such transportation the definition of the products excepted from the certificate had been clearly announced by he Commission. Such regulations as had been promulgated were not sufficiently definite and certain to place appellant on notice of the possible unlawful character of its conduct. Conviction of the defendant constitutes conviction by construction. Appellant has been "construed into jail".

[4]See Appendix I, Item No. 3, for quotation from the case cited. The factual situation is such that the case has particular pertinence.

2. Statement of the Argument.

Upon a determination that a question existed as to the propriety of the acts of the appellant several remedies were available to the Interstate Commerce Commission. The Commission had the power to institute investigation through its own procedures to determine whether or not a violation of the certificate existed.

49 U. S. C. A. §319;
49 U. S. C. A. §13(2).

Except for the applicability of the "primary jurisdiction" doctrine the remedy of injunction was also available.

49 U. S. C. A. §322(b).

This action is criminal in its nature. It was instituted without any prior admonition by the Commission to appellant that its activities were considered improper. (Tr. 79.)

The criminal character of the prosecution brings into the inquiry an element not present in the other possible forms of procedure. Before a person can be punished criminally it must plainly appear that he has violated the law or some rule or regulation lawfully binding upon him by force of law.

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827, (C. C. A. 6th, 1946);
See: *U. S. v. Pacific & Arctic Railway and Navigation Co.,* 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742 (1913).

The Court in the case first cited above stated the proposition as follows:

> "Moreover, in federal jurisprudence, there is no such thing as a constructive offense. We have repeatedly pointed out that a citizen cannot be construed into jail." *Hancock Mfg. Co. v. U. S., supra,* p. 832.

In the discussion of the argument relating to the "primary jurisdiction" doctrine appellant has pointed out a number of the many circumstances which demonstrate that the meaning of the words "dangerous explosives" as used in its certificate is far from clear and certain. It would serve no useful purpose to repeat the details of those examples here.

The question is not one of notice of the potentially dangerous properties of any given articles but whether the article, whatever its properties, properly fell within the meaning of the words used in the certificate. The record shows that when the problem was first presented the appellant was unable to determine the answer to the question for itself. (Tr. 188.) Appellant sought the advice of legal counsel on the subject. (Tr. 188.) It felt called upon to file an application, the fundamental purpose of which was a clarification of the very term which is here involved. (Ex. 2, Tr. 193.) Nowhere, in any effective regulations governing the transportation of explosives was there a definition of the term "dangerous explosives". (Ex. 23, §§73.51, 73.52, 73.53, 73.88, 73.100.) The Interstate Commerce Commission had recently amended its regulations by

deletion therefrom of the words "dangerous" and "less dangerous" as characterizations of the commodities in the sections of the regulations undertaking a definition. Only by assuming that these amendments had no substantive effect upon the definition of the term "dangerous explosives" as used in certificates could it be inferred that all items falling within explosives "Class A", "Class B", or "Class C" should be included in the prohibited class.

It is respectfully suggested that under all the circumstances and considering the confused state of the regulations, it may not be said that the existing regulations were clear and certain. Before finding appellant guilty the District Court was required to make a preliminary finding of fact that the words "dangerous explosives" included such items as hand grenades and rocket ammunition. Nowhere, in the effective regulations are these products so designated. Even assuming the propriety (in view of the primary jurisdiction doctrine) of the action of the Court in undertaking to define the language of the certificate the fact still remains that a definition by the Court was required before a conviction could result. The conviction depends upon the construction of the language of the certificate by the Court.

It is respectfully submitted that the regulations existing at the time this transportation was performed and the phraseology of the certificate were both sufficiently indefinite and uncertain that reasonable minds could differ as to the scope and meaning of the phrase

"except dangerous explosives". Under the circumstances there did not exist that plain and lawfully binding regulation which is a necessary requisite to a criminal liability.

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827, (C. C. A. 6th Cir. 1946).

C. Argument Related to the Admissibility of Exhibits Numbers 3-22 Inclusive and Upon the Ruling Denying the Motion to Strike Such Exhibits. (Specification of Error Number Three and Number Four).

1. Summary of the Argument.

The shipments here involved were sealed against examination by any person in the employ of the defendant. Exhibits 3-22 inclusive cannot, therefore, constitute an admission of the facts recited. The fact also affirmatively appears that the entrant of the information on the exhibits could not have known the truth of the facts recorded. The foundation required by statute was not laid because (a) no proof was offered to establish the identity of the entrant; (b) the United States presented no evidence to establish the source of the information to the entrant (whoever he may have been); (c) no proof was offered as to the identity or capacity of the original declarant; (d) no evidence was presented to establish that the original declarant (whoever he may have been, and by whom employed) prepared the information in the course of business of the business or agency by whom he may have been employed; (e) no evidence was presented

that the original information was transmitted to defendant for entry by defendant; (f) no evidence was presented to prove the original declarant made records, or, if so, that they were made at or about the time of the event. No explanation was given for the failure to produce such proof.

Since the defendant was prohibited by the sealed character of the equipment from examining the contents of the shipments the statements in the freight bills as to the contents are hearsay as to the defendant. Proof of the facts as to the contents and characteristics of the shipments may not be established by the invoices alone. Before the invoices become probative evidence of the facts as to the nature of the contents some independent proof to establish the guarantee of their accuracy as to the description of the contents is required. No such proof was here presented.

2. Statement of the Argument.

Specifications of Error Numbers Three and Four may be considered together since they are related to the same subject. The exhibits involved are Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21 and 22 (herein referred to as Exhibits 3-22 inclusive). Each exhibit relates to a different count in the information. Except for Exhibit 4 all exhibits consist of a copy of a freight bill produced from the records of the appellant.

Counsel for the appellant believes it to be a correct statement that the case of the United States rests en-

tirely upon these documents as proof of the acts and occurrences necessary to establish criminal liability. The sole witness appearing for the United States had no independent knowledge of the facts beyond those reflected in the records or statements related to him by an employee of the appellant who in turn secured all information which he undertook to give from the face of the document itself. (Tr. 50-51, 71.) No evidence was tendered by the United States to prove that the documents were the only available source of information. No evidence was introduced to explain the failure to produce direct testimony. It is necessary, therefore, to support the conviction of the defendant that these documents were properly before the Court and that they constitute sufficient proof of the transaction which is the basis of the several counts of the information.

Since it affirmatively appears from the evidence that the employee of the appellant making the entry could not have seen the product described in the freight bills and there is no proof that such person ever saw or had access to any means of acquiring actual knowledge of the facts purportedly recorded, the documents may not be considered as an admission. Counsel does not understand that the United States so contends. Rather, the documents are offered as records made in the regular course of business of the appellant and claimed to be admissible as such despite the hearsay character of the information.

Title 28, §1732 sets forth the terms and conditions under which business documents will be received and the effect to be given to such documents.[5]

The first objection urged to the documents is the insufficiency of the foundation to justify their introduction and retention in evidence. Reduced to its essentials this foundation consists of a statement of an attorney for the Interstate Commerce Commission that the documents were secured from the files of the appellant; that the documents are freight bills; that the appellant is required to make freight bills of shipments which it handles. From other evidence subsequently presented, it appears affirmatively that the entrant (an unknown person, presumed to be an employee of appellant) could not have had personal knowledge of the facts recorded because the shipments were physically sealed in the vehicle in which they moved and could not be examined. (Tr. 156-158.) We know in addition only that it was the practice of the employees of the appellant to make such documents from shipping documents prepared by others, i.e., the originating carrier or the United States, and that it was not infrequent that the original shipping documents of the government were unavailable. (Tr. 198.)

The mere fact that the paper offered is taken from a business file does not *ipso facto* make it admissible.

> *Schmeller v. United States,* 143 Fed. (2d) 544 (C. C. A. 6th Cir. 1944).

[5]The text of the section is set forth in Appendix I, Item No. 4.

The act, transaction, occurrence or event which the entrant records must be one of which either he has actual knowledge or which he learns from a declarant who shall in the course of the business transmit the information for inclusion in the memorandum.

United States v. Grayson, 166 Fed. (2d) 863, (C. C. A. 2nd Cir. 1948).

In the present case there is affirmative evidence that the entrant (i.e., appellant's employee) could not have had personal knowledge of the facts recorded. The shipment was sealed against examination. The first possible basis for assuming the accuracy of the statement as a business document, therefore, is absent.

The United States made no effort to establish from what source the information may have been obtained. The suggestion is made that it may have come from a government bill of lading. (Tr. 123.) These documents should have been available in government records. No evidence to explain their absence at the trial was shown. The witness offering the documents had not compared them with any other shipping records. (Tr. 77, 123.) Except for the statement of Mr. Shepherd, made after the documents had been received and the motion to strike denied, that the information might have come from any one of several different places, the record is entirely silent as to the possible sources of the information to the entrant. Exhibit A reflects that the shipping documents presented to appellant from different sources covering the same shipment may vary as to context.

To establish the foundation for the admissibility of the documents the burden was on the United States to prove the entries were a part of the business records and that they were made at or about the time of the events. Since the documents reflect at most simply the entries from other documents the burden was on the United States to prove the basic facts to establish as business records the documents from which the entries in appellant's records were allegedly made. This the United States did not do. It failed both to show the source of the entry in the appellant's records and the time of that entry. Even if it be assumed that the source was taken from some document coming from another, no showing is made as to what this document may have been or the circumstances surrounding its preparation.

Once the United States was compelled to concede, as was the case here, that the appellant had no access on the basis of personal knowledge to the facts as to the physical contents of the shipments described, the burden was on the United States to show the source of the information and facts to prove the probative value of such source. It was incumbent to establish, as a condition of the admissibility of the exhibits, that the person making the original documents in turn prepared them in the course of business in conformity with the requirements of Title 28, §1732 and that the information was transmitted for inclusion in the records of appellant. Such evidence is wholly absent from the record. Nor is its absence explained. It is respectfully submitted that under the particular fact circum-

stances here presented sufficient foundation was not laid to meet the requirements of §1732, Title 28 U. S. C. A.

To be admissible in evidence the documents must not only meet the requirements as to foundation but they must also meet the necessary standards of competency. The documents are relied upon to prove both the fact of transportation and the explosive character of the articles involved. These are both subjects which it would seem could be proved or substantiated by production of witnesses personally familiar with the facts. In this instance no such direct evidence was presented. No explanation for the lack of such evidence was given. Even though the entrant may not have personal knowledge the record must have some guarantee of accuracy as reflecting the probative fact. The probative fact must be reflected by the document.

The freight bill, in effect, is an invoice. In *United States v. Garvey,* 150 Fed. (2d) 767 (C. C. A. First (1945)), much the same situation as is presented here was before the Court. The defendant was charged with the theft of clothing in interstate commerce. By independent evidence defendant had been proved to have taken certain cartons. To prove the value of the goods and the contents of the cartons the United States offered invoices, properly authenticated, of the two shippers. As to one of the shippers, evidence was also offered of the practice of comparing the goods with invoice as it was packaged. As to the other shipper no such information was furnished. With respect to the sufficiency of these invoices the Court stated:

> "That was obviously good evidence as far as it went, but it did not prove that the cartons in fact contained the clothing described in the invoices." (767.)

The Court then held that the invoices of the one shipper when supplemented by direct proof as to the practice of checking against the contents were admissible to prove the facts reflected, but that the invoices of the other shipper with respect to which such supplementary evidence was not given could not be accepted as proof of the fact of the contents of the cartons.

The facts here against the competency of the evidence presents a stronger case than do those in the case cited. There the person who made the record was present and presumably the facts could have been known to the entrant. Here the evidence affirmatively shows the employees of appellant could not have known the facts from direct knowledge. There is a complete failure of evidence as to the manner in which the record was prepared and as to the reliability of the sources of the information.

In *Schmeller v. United States,* 143 Fed. (2d) 544 (C. C. A. 6th Cir. 1944), the trial court admitted into evidence as a group a series of documents established to have come from the files of the defendant kept in the regular course of business. They were offered to prove the manufacture of defective war materials. Some of the documents contained statements which constituted hearsay as to the defendant. The Court in the cited case held the introduction of these documents

as a group and without establishing the authenticity as to the sources of each was error.

In the instant case the statements on the shipping documents of the appellant are clearly hearsay since it was prevented by the manner in which the goods was shipped under seal from a personal verification of the truth. As noted in the case last cited, §1732, Title 28 U. S. C. A. does not abrogate ordinary requirements of relevancy and competency.

In *John Irving Shoe Co. v. Dugan,* 93 Fed. (2d) 711 (C. C. A. First, 1937), plaintiff sued to recover for work done in a construction project for defendant. To prove its claim the plaintiff offered an itemized statement showing the entry of some 400 different items of goods and materials furnished. The trial court ruled that this invoice did not prove the fact that labor or material was furnished as itemized therein. This ruling was affirmed by the Circuit Court on appeal.

A case presenting many elements similar to those which are here involved was presented to this Court in *Lomax Transportation Co. v. United States,* 183 Fed. (2d) 331 (C. C. A. 9th Cir. 1950). In the cited case the United States brought action for damages for destruction of naval stores in a warehouse of the defendant. Evidence as to what the goods were, their value and the amount of damage done to them was contained in a certificate of settlement prepared apparently by the office of Comptroller of the United States and issued under his name by some person presumably in his department. This court in the cited case held the docu-

ment inadmissible to establish the probative facts involved. As a part of its opinion this Court stated:

> "No witness who had knowledge of the goods, of the value or of the amount of damage done to them was produced. It is inconceivable that the provisions of Sections 1732 and 1733, Title 28 United States Code Annotated, although they do, of course, render admissible, when duly authenticated, the records and claims, or transcripts thereof, of which a certificate is the culmination could have the effect of converting the mere *ex parte* statement of the claim itself into evidence of the extent to which the naval supplies stored in appellant's warehouse had been damaged by fire." (334.)

Although the specific facts are different the parallel of the factual situations is rather close. The specific document tendered in evidence here is nothing more than a transcription of words from an unknown source by a person who had no knowledge of the facts. Who may have actually prepared the document is not known. Presumably it was an employee of appellant. The person who presented the record simply took it from the company files. What actually was the source of the information contained in the record was not shown. Even on its face the document does not undertake to describe a particular article. Rather it describes a class of articles. No witness who had knowledge of the goods was presented. No witness who had knowledge of the facts of classification was presented. The

record is even devoid of testimony as to how, or by whom, the classification may initially have been made.

The whole case of the United States hinges upon the fact that the investigator for the Interstate Commerce Commission found among the freight bills of the appellant certain documents using certain words to describe certain classes of items described in Exhibit 23 as having explosive characteristics. No positive evidence is presented as to the identity of the entrant, the time or circumstances when the entry was made, the source of the information, the validity of the source or the accuracy of the judgment of the person who may originally have selected as descriptive of the products the words which ultimately found their way into the documents in question. All that is actually known for certain is that no person in the employ of the appellant had an opportunity to see or examine the goods at any time.

The freight bill alone, considering the known circumstances, and the many unknown factors, cannot be accepted as competent proof of the fact as to the character of the goods or as to their explosive characteristics.

See:

Reineke v. United States, 278 Fed. 724 (C.C.A. 6, 1922);

Ellis v. United States, 57 Fed. (2d) 502 Cer. Den. 287 U. S. 635, 53 S. Ct. 85, 77 L. Ed. 550 (1932).

Appellant respectfully submits that the admission into evidence of Exhibits 3-22 inclusive was error and that the denial of the motion to strike upon completion of the evidence of the United States was likewise error.

D. The Argument Directed to the Sufficiency of the Evidence to Establish the Fact of Transportation and the Explosive Character of the Commodities Shipped. (Specification of Error Number Five.)

1. Summary of the Argument.

Essential elements of the offense charged are the exact nature of the goods transported and that the explosive characteristics thereof are such that they qualify as "dangerous." The sole evidence to prove both of these fact elements is contained in Exhibits 3-22 inclusive and Exhibits 23 and 24. All of the exhibits describe a class of commodities and not particular products. Description by general classification in shipping documents is insufficient to prove the contents of the several trucks and their particular explosive characteristics.

2. Statement of the Argument.

Examination of Exhibit 23, Sections 73.53 and 73.88 reveals at once that each and every one of the so-called commodity descriptions appearing in Exhibits 3-22 inclusive is in fact description of goods by a general class and not by a particular product. "Ammunition for cannon, with explosive projectile," for example, is defined in such general terms that it includes many dif-

ferent kinds and sizes of shells. It is obvious from Exhibit 23 that the classification into which a particular item of ammunition falls depends upon the intended use and the detonating characteristics of the particular explosive ingredients used. The record is devoid of any evidence to prove that the particular goods in any of the appellant's trucks had the explosive properties or the intended use necessary to bring it within the classification described. To conclude that the particular ammunition was in fact "ammunition for cannon" it must be presumed that some entirely unknown person had the necessary technical qualifications to evaluate properly the explosive characteristics of the goods and that he did in fact correctly classify it.

The problem is an important one. A particular shell does not become "ammunition for cannon" simply because someone says it is such. It is ammunition for cannon only if it has certain properties. Without some knowledge of the contents and properties of the particular type of ammunition appellant was powerless to challenge the correctness of the classification by expert testimony or otherwise.

The proper classification of a particular item of property under the several classifications in a tariff or regulation is a highly technical process calling for considerable expert judgment.

See:

Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1921);

Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999 (1931);
Armour and Co. v. Alton R. Co., 312 U. S. 195, 61 S. Ct. 408, 85 L. Ed. 771 (1941);
Hancock Mfg. Co. v. United States, 155 Fed. (2d) 827 (C.A.A. 6th Cir. 1946).

The nature of the particular products and their explosive characteristics are the gravamen of the offense. Appellant respectfully submits that criminal liability should not depend entirely upon the mere presumption that some unknown person properly analyzed the explosive properties of a given product and correctly described it under a regulatory classification. The judgment is unsupported by the evidence because there is no proof that the goods shipped were actually such that they would be described properly under the classification chosen and no proof of their explosive characteristics.

The entire case of the United States depends upon the sufficiency of the entries in appellant's freight bills to prove the fact as to what was in the trucks that moved and that the goods, whatever they might have been, had certain explosive characteristics. As has been noted in a previous connection, direct evidence is required to prove the nature of a commodity, even though it may be described in a business document.

United States v. Garvey, 150 Fed. (2d) 767, (C. C. A. First, 1945);
John Irving Shoe Co. v. Dugan, 93 Fed. (2d) 711 (C.C.A. First, 1937);

See: *Lomax Transportation Co. v. United States,* 183 Fed. (2d) 331 (C.C.A. 9th Cir. 1950).

No explanation is given by the United States for its failure to produce the direct evidence of the facts which must certainly have been available. The descriptions in the several exhibits are descriptions by class only. The appellant should not be criminally convicted upon the assumption, without any supporting evidence, that some unknown person exercised correct judgment in classifying a number of different specific products within the classifications used.

E. The Argument Directed to the Question of the Sufficiency of the Evidence to Prove That the Transportation was Knowingly and Willfully Performed. (Specification of Error Number Six).

1. Summary of the Argument.

The words "knowingly and willfully" contemplate the performance of the act with a bad intent. Appellant, as a common carrier, had a legal obligation to transport all goods tendered within the scope of its certificate. The United States as the shipper was in possession of a copy of the certificate. The meaning of the language in appellant's certificate was not clear. Appellant took prompt steps in an effort to ascertain and clarify the meaning of the language. It had no intimation from any representative of the Commission that its conduct was considered improper until the transportation was virtually concluded. The evidence

fails to establish the bad intent which the statute requires as an element of criminal liability.

2. Statement of the Argument.

Prior to the time that any of the questioned traffic moved, appellant submitted to the appropriate military authorities a copy of its certificate. (Tr. 183.) Shipments subsequently tendered by the United States included explosive items. (Tr. 104.) Many of these explosive items were products which the Interstate Commerce Commission now concedes were proper for transportation (Tr. 104-105). Frequently explosive items of different classifications were intermingled as a part of the same shipment. (Ex. 3, 5, 16, 17, 18, 22.) The contents of all shipments were sealed by the government against inspection. (Tr. 156-159.) Appellant at the time was handling in total some 40,000 to 60,000 shipments per month. (Tr. 182.) The traffic was tendered for shipment by the United States military authorities who held a copy of the certificate. (Tr. 183.) Appellant, as a common carrier, had a duty to accept the goods for transportation if it could do so under its certificate.

> *Wabash R. Co. v. Pearce,* 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231;
> *The Atchison, Topeka & Santa Fe Ry. Co. v. Denver & New Orleans Ry. Co.,* 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

The general traffic manager for appellant was unable to determine what commodities were to be consid-

ered as "dangerous explosives" by reference to then effective regulations. (Tr. 188.) Legal counsel was unable to answer the question. (Tr. 189.) An application was filed with the Interstate Commerce Commission in October, 1950 the purpose of which was to clarify the meaning of the language in question. (Ex. 2, Tr. 20-24, 193.) The investigation resulting in the information was not made until approximately the date of the last questioned shipment. (Tr. 50, Ex. 19.) During the investigation appellant made no effort to conceal its activities. (Tr. 78.) As more fully noted in the previous discussion of the argument relating to the "primary jurisdiction" doctrine the regulations of the Commission on the subject are not clear and certain.

The words "knowingly and willfully" are contained in the statute under which appellant has been convicted. 49 U. S. C. A. § 322.

The words mentioned imply not only a knowledge of the thing, but a determination that the act was done with a bad intent to do it. The word "willfully" means not merely voluntarily but with a bad purpose.

> *Luther M. Felton v. United States,* 96 U. S. 699, 24 L. Ed. 875 (1877);
> *Screws v. United States,* 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

It is respectfully submitted that in view of all of the circumstances surrounding the tender of the goods; in view of the confused character of the regulations;

because of the lack of a clear definition of the language of the certificate; and because of the prompt action which the appellant took to clarify the question long before any investigation was undertaken, it may not be said either that appellant had the knowledge that the shipments it transported were sufficiently "dangerous" to meet the requirements of the criminal statute, or that its transporaion was willful within the meaning of the Act in question.

F. Conclusion.

Appellant respectfully urges that the facts demonstrate here a case in which the "primary jurisdiction" doctrine is applicable and that the judgment should be reversed with directions to the District Court to dismiss the information. It is further submitted that apart from this issue the introduction and retention in evidence of Exhibits 3-22 inclusive constitute prejudicial error. Even conceding the correctness of the admissibility of these documents the evidence fails to establish the facts necessary to prove the existence of the offenses charged beyond a reasonable doubt. It is respectfully submitted that on each of the grounds urged herein a reversal of the judgment is required.

Respectfully submitted,

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Appendix

APPENDIX I

Item No. 1

a. Exhibit 23, Section 77.801, p. 120, provides as follows:

> §77.801. Scope of regulations in Parts 71-78. (a) Explosives and other dangerous articles, except such as may not be accepted and transported under Parts 71-78, may be accepted and transported by common and contract carriers by motor vehicle engaged in interstate or foreign commerce, provided they are in proper condition for transportation and are certified as being in compliance with Parts 71-78, and provided the method of manufacture, packing, and storage, so far as they affect safety in transportation, are open to inspection by a duly authorized representative of the initial carrier or of the Bureau of Explosives. Shipments that do not comply with Parts 71-78 must not be accepted for transportation or transported."

b. Exhibit 23, Section 77.822, p. 122, provides as follows:

> "§77.822. Acceptable articles. (a) Any motor carrier may accept for transportation or transport any acceptable explosive or other dangerous articles listed in the Commodity List, §72.5: *Provided, however,* That no provision of this section shall be so construed as to permit the acceptance or transportation of liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol din-

itrate, other than as defined in §73.53 (e), by any common carrier.

"(b) Liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol dinitrate. Liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol dinitrate, other than as defined in §73.53 (e)(may be transported only by motor carriers other than common carriers in containers complying with specification MC200 (§78.315). No form of trailer may be attached." (122-123.)

Item No. 2

Strickland Transportation Co., Inc., Extension—Dangerous Explosives, 49 M. C.C. 595 (1949). At pages 600 and 601, Division 5, two Commissioners participating, stated:

"One other matter is deserving of special comment and that is the identity of the commodities comprehended by the term 'dangerous explosives'. Notwithstanding that such term is frequently used in describing a class of commodities specifically granted or excepted from general-commodity authorizations, we have not heretofore specifically declared the commodities included in that term. This does not mean, however, that we have left the term undefined or that it is indefinite. In the Commission's Regulations Governing the Transportation of Explosives and Other Dangerous Articles by Rail Freight, Express, and Baggage Services, and by Motor Vehicle (Highway) and Water, the various different explosives are classified as 'Dangerous,' 'Less Dangerous,' and 'Relatively

Safe.' With this formal declaration of the commodities deemed, from a transportation standpoint, to be dangerous to a greater or lesser degree as contrasted with those which are deemed to be relatively safe, the proper construction of the term 'dangerous explosives' as used in operating authorities of carriers is clear. A carrier authorized to transport general commodities except 'dangerous explosives' lawfully can transport those explosives which the Commission has classified 'relatively safe' but *not* those which it has classified as 'dangerous' whether more dangerous or less dangerous. Conversely, a carrier authorized to transport 'dangerous explosives' may transport only those commodities classified as 'dangerous' and 'less dangerous' in the above-mentioned regulations of the Commission."

Item No. 3

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827 (C. C. A. 6th 1946).

In the case cited, defendant was charged with unlawfully soliciting and receiving a concession from a motor carrier. The factual situation presented was whether or not the articles shipped were "stampings" within the meaning of the term in the carrier's tariff. In holding the "primary jurisdiction doctrine" applied and that the evidence was insufficient to support the conviction, the Court stated in part as follows:

"The court of course concluded that Hancock was guilty beyond a reasonable doubt, otherwise

there could have been no judgment. To support the verdict, the evidence must show beyond a reasonable doubt that appellant shipped automobile body parts as stampings and paid the lower rate carried by 'stampings'. This involves the critical question, whether the articles shipped constituted stampings. The court must have concluded that they did and must have drawn this inference from the testimony of the Government's witnesses. In our view another judge or other judges upon the same record might with reason have believed appellant's witnesses and have arrived at a contrary result and thus we would have the anomaly of convictions or acquittals upon the same record, the result depending upon the particular judge's viewpoint as to what constitutes stampings. Further, another or other sets of witnesses testifying upon the same subject in other cases might with reason and intelligence entertain varying opinions on the subject.

"The difficulty here is that it is manifest from the evidence that the word 'stampings' is indefinite and uncertain in its meaning and 'fixes no immutable standard' which a court must recognize as a matter of law. . . ."

"The court obviously could not be assisted by reference to a dictionary, or to popular usage or understanding, for the meaning of the term. The tariff was not clear whether an otherwise plain stamping ceased to be a stamping, because it had small parts welded to it for strength. . . ."

"Further, in our view the word 'stampings' used in the tariffs did not even present a question

of fact of the kind usually left with a jury. In reality it presented a question of fact the determination of which in a civil case has been adjudged to lie with a body of experts. In *Great Northern R. Co. v. Merchants Elevator Co.,* 259 U. S. 285, 42 S. Ct. 447, 66 L. Ed. 943, the Supreme Court rejected the contention that courts without jurisdiction in cases involving a disputed question of construction of the interstate tariff, stating the familiar rule that the construction to be 'given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in question.' But, quoting further:

" 'When the words of a written instrument are used in their ordinary meaning, their construction presents solely a question of law. But words are used sometimes in a peculiar meaning. . . .'

" It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether the words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the question in the *American Tie and Timber* case, *supra*. . . . The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. . . . This question was obviously not one of construction. . . . *The only real* question in the case was one of *fact*. . . .' As that question, unlike one of construction, could not be settled ultimately by this court, preliminary resort to the Commission was necessary to insure uniformity. . . .

"Upon evidence here, we are no more able correctly to construe or interpret the term 'stampings' than was the Supreme Court to settle by construction a freight tariff in the *Great Northern* case. Moreover, in federal jurisprudence, there is no such thing as a constructive offense. We have repeatedly pointed out that a citizen cannot be construed into jail. . . ." (830, 831, 832.)

Item No. 4

Title 28 U. S. C. A. §1732 provides as follows:

"§1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by an Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, tranaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in exstence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§1, 3, 65 Stat. 206."